# Dayang Huzaimah bt Abg Mohd Basri v Badan Pencegah Rasuah

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42A-3 OF 2009-III
RAVINTHRAN JC
9 SEPTEMBER 2010

*Criminal Law — Corruption — Making inconsistent statement to officer of Anti-Corruption Agency — Statement inconsistent with appellant's later statement in court — Appeal against conviction and sentence — Whether knowledge was important element of offence — Whether offence was strict liability offence — Whether trial judge erred in not adequately dealing with knowledge as element — Whether appellant's statement to ACA officer inadmissible — Anti-Corruption Act 1997 ss 19 & 22(1)*

*Criminal Procedure — Sentence — Appeal against sentence — Convicted under s 19(2) of the Anti-Corruption Act 1997 — Whether term of imprisonment excessive — Factors to be considered*

The appellant, a policewoman holding the rank of lance corporal, and her colleague ('DW3') were members of a police patrol team that had stopped a motorcycle. DW3, who had allegedly accepted RM100 from one of the two men on the motorcycle, was charged under s 11 of the Anti-Corruption Act 1997 ('the Act'). During an investigation into this charge, the appellant gave a statement to an officer of the Anti-Corruption Agency ('the ACA officer') that all the members of the police patrol team including DW3 had alighted from the police car to inspect the motorcycle. Her statement also said that later on the same day, when she was having a drink with DW3, the latter had said that one of the two men on the motorcycle, which they had stopped, had given him RM50. The appellant was called as a prosecution witness in DW3's corruption trial. During the trial, the appellant told the court that DW3 had not come out of the police car to inspect the motorcycle. She also told the court that when she and DW3 went out for a drink later, they had not discussed anything about the incident involving the two men on the motorcycle. The appellant was charged with committing an offence under s 19(2) of the Act. The sessions court judge admitted the notes of proceedings from DW3's trial and found irreconcilable differences between the appellant's statement to the ACA officer and the appellant's statement in court. The appellant was convicted and sentenced to 15 months imprisonment and a fine of RM5,000. The appellant appealed against the conviction and sentence on the grounds that the prosecution had not established the element of knowledge, which was an essential ingredient of

A the offence under s 19(2) of the Act, and that the trial judge had not considered this element in her judgment; and that the appellant's statement to the ACA officer was not admissible. The prosecution submitted that knowledge was not an ingredient of an offence under s 19(2) of the Act and even if it was the prosecution had adduced evidence to prove this ingredient.

B

**Held,** dismissing the appeal against conviction but allowing the appeal against the sentence:

(1) This court found that s 19(2) of the Act could not be a strict liability offence and that in order to prove the commission of an offence under s 19(2) of the Act, the prosecution needed to prove that the appellant's statement in court was inconsistent with the earlier statement she made to the ACA officer. The knowledge element came from the word 'inconsistent', which necessarily implied knowledge. In the present case the prosecution had proven the element of knowledge by introducing the notes of proceedings from DW3's trial. Further, as a serving lance corporal in the police force the appellant would have knowledge that the statement made to the ACA officer was incriminatory of DW3 (see para 10).

(2) The appellant's two statements were obviously irreconcilable. The appellant's statement to the ACA officer incriminated DW3 while her later statement made in court absolved him of any wrongdoing. Therefore, it could be inferred that the appellant had knowledge that her statement in court was inconsistent with her statement to the ACA officer. In the premises the prosecution had adduced evidence of knowledge on the part of the appellant in giving two inconsistent statements by the direct evidence of the ACA officer and also by inference (see paras 10 & 12).

(3) The trial judge had adequately dealt with the issue of whether the appellant had knowledge of the significance and content of the statement she had given to the ACA officer. As such, there was no misdirection by the trial judge (see para 11).

(4) Under s 22(1)(a) of the Act, an officer of the ACA had the power to 'order' any person to attend before him for the purpose of being examined orally. At the same time s 22(1)(a) of the Act did not require the order to the appellant to appear before the ACA officer to be a 'written order'. Even if it was interpreted as a 'written order', the oral statement by the appellant to the ACA officer would not become inadmissible because no written order was issued or if issued was not produced in court. The only pre-condition of admissibility of a statement under s 22 of the Act was that it should be made voluntarily. In the present case the trial judge had ruled that the appellant's statement to the ACA officer was voluntarily made (see para 14).

(5) In the instant case the appellant had acted out of a sense of misguided loyalty to a colleague. The fact that she stood to lose her job as a public servant was in itself considered a severe punishment especially since her actions were not motivated by profit. Thus, the appellant's term of imprisonment was reduced from 15 months to 6 months (see para 15).

**[Bahasa Malaysia summary**

Perayu, seorang polis wanita berpangkat lans korporal, dan rakannya ('SD3') merupakan anggota polis rondaan yang telah menghentikan sebuah motorsikal. SD3, yang dikatakan menerima RM100 daripada salah seorang daripada dua lelaki di atas motosikal, dituduh di bawah s 11 Akta Pencegahan Rasuah 1997 ('Akta'). Semasa penyiasatan dibuat terhadap pertuduhan ini, perayu memberikan kenyataan kepada seorang pegawai Badan Pencegah Rasuah ('pegawai BPR') bahawa semua anggota polis rondaan termasuk SD3 telah turun daripada kereta polis untuk memeriksa motosikal. Kenyataan dia juga mengatakan bahawa kemudiannya pada hari yang sama, semasa dia sedang minum bersama SD3, perayu mengatakan bahawa seorang daripada dua lelaki di atas motosikal yang diberhentikan mereka, telah memberikannya RM50. Perayu dipanggil sebagai saksi pendakwaan dalam perbicaraan rasuah SD3. Semasa perbicaraan, perayu memberitahu bahawa SD3 tidak keluar daripada kereta polis untuk memeriksa motosikal. Dia juga memberitahu mahkamah bahawa apabila dia dan SD3 keluar untuk minum kemudiannya, mereka tidak membincangkan apa-apa mengenai insiden melibatkan dua lelaki di atas motosikal. Perayu dituduh melakukan kesalahan di bawah s 19(2) Akta. Hakim mahkamah sesyen mengakui nota-nota prosiding daripada perbicaraan SD3 dan mendapati perbezaan ketara di antara kenyataan perayu kepada pegawai BPR dan kenyataan perayu di mahkamah. Perayu disabitkan dan dijatuhkan hukuman 15 bulan penjara dan denda RM5,000. Perayu merayu terhadap sabitan dan hukuman atas alasan bahawa pendakwa raya tidak membuktikan elemen pengetahuan, yang merupakan intipati utama kesalahan di bawah s 19(2) Akta, dan bahawa hakim perbicaraan tidak mempertimbangkan elemen ini dalam penghakiman beliau dan bahawa kenyataan perayu kepada pegawai BPR tidak boleh diterima pakai. Pendakwa raya menghujah bahawa pengetahuan bukanlah intipati kepada kesalahan di bawah s 19(2) Akta dan sekiranya betul, pendakwa raya telah mengemukakan keterangan untuk membuktikan intipati ini.

**Diputuskan,** menolak rayuan terhadap sabitan tetapi membenarkan rayuan terhadap hukuman:

(1) Mahkamah mendapati bahawa s 19(2) Akta bukan merupakan kesalahan liabiliti ketat dan bagi membuktikan perlakuan kesalahan di bawah s 19(2) Akta, pendakwa raya perlu membuktikan bahawa kenyataan perayu di mahkamah tidak konsisten dengan kenyataan awal yang dibuat terhadap pegawai BPR. Elemen pengetahuan datangnya daripada

perkataan 'tidak konsisten', yang semestinya bermaksud pengetahuan. Dalam kes ini, pendakwa raya telah membuktikan elemen pengetahuan dengan memperkenalkan nota-nota prosiding daripada perbicaraan SD3. Seterusnya, sebagai lans korporal yang berkhidmat dalam pasukan polis, perayu seharusnya mempunyai pengetahuan bahawa kenyataan yang dibuat kepada pegawai BPR menyabitkan SD3 (lihat perenggan 10).

(2) Dua kenyataan perayu adalah jelas berbeza. Kenyataan perayu kepada pegawai BPR menyabitkan SD3 manakala kenyataan yang kemudiannya dibuat dalam mahkamah membebaskannya daripada sebarang salah laku. Oleh itu, diandaikan bahawa perayu mempunyai pengetahuan bahawa kenyataannya di mahkamah adalah tidak konsisten dengan kenyataannya kepada pegawai BPR. Dengan ini, pendakwa raya telah mengemukakan keterangan pengetahuan bagi pihak perayu dalam memberikan dua kenyataan tidak konsisten melalui keterangan secara langsung pegawai BPR dan juga melalui andaian (lihat perenggan 10 & 12).

(3) Hakim perbicaraan telah menguruskan secara secukupnya dengan isu sama ada perayu mempunyai pengetahuan mengenai kandungan dan signifikan kenyataan yang diberikan olehnya kepada pegawai BPR. Oleh itu, tidak terdapat salah panduan oleh hakim perbicaraan (lihat perenggan 11).

(4) Di bawah s 22(1)(a) Akta, seorang pegawai BPR mempunyai kuasa untuk 'mengarahkan' mana-mana individu untuk hadir di hadapannya bagi tujuan pemeriksaan lisan. Pada masa yang sama s 22(1)(a) Akta tidak memerlukan perintah kepada perayu untuk hadir di hadapan pegawai BPR untuk dijadikan sebagai 'perintah bertulis'. Meskipun sekiranya ia ditafsirkan sebagai 'perintah bertulis', kenyataan lisan oleh perayu kepada pegawai BPR tidak boleh ditolak kerana tiada perintah bertulis dikeluarkan atau meskipun dikeluarkan, ia tidak dikemukakan di mahkamah. Satu-satunya syarat sebelum penerimaan kenyataan di bawah s 22 Akta ialah ia seharusnya dibuat secara sukarela. Dalam kes ini hakim perbicaraan telah memutuskan bahawa kenyataan perayu kepada pegawai BPR telah dibuat secara sukarela (lihat perenggan 14).

(5) Dalam kes ini, perayu bertindak luar daripada kesetiaan membuta tuli terhadap rakan sekerja. Fakta bahawa dia mungkin kehilangan kerja sebagai pengkhidmat awam dengan sendirinya dianggap sebagai hukuman berat tambahan pula tindakannya tidak didorong oleh keuntungan. Oleh itu, tempoh penjara perayu dikurangkan daripada 15 bulan kepada 6 bulan (lihat perenggan 15).]

**Notes**

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3553–3615.

For cases on corruption in general, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 136–158.

**Cases referred to**

*Lim Chin Aik v Regina* [1963] 1 MLJ 50, PC (refd)
*PP v Abdullah Ambek* [1984] 2 CLJ 370, HC (refd)
*Sweet v Parsely* [1969] 2 WLR 470, HL (refd)

**Legislation referred to**

Anti-Corruption Act 1997 ss 11, 19(2), (3), 22(1)(a), (b), (c)
Penal Code s 193

*Anthony Tai (Anthony Tai) for the appellant.*
*Wirna bt Rifin @ Ari (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.*

**Ravinthran JC:**

**[1]** The appellant is a policewoman holding the rank of lance corporal. She was convicted by the sessions court for an offence under s 19(2) of the Anti-Corruption Act 1997. She was sentenced to 15 months imprisonment and a fine of RM5,000 in default six months imprisonment. She appealed against the conviction and sentence.

BRIEF FACTS

**[2]** The facts of this case are related to another case (61–15 of 2006–III). In that case a colleague of the appellant (Lans Koperal Busri bin Sebli DW3) was charged under s 11 of the Anti-Corruption Act 1997 (the ACA Act). The appellant was a prosecution witness in the corruption trial of DW3. Apparently, the appellant, DW3 and one Lans Koperal Riduan Abdullah were members of a police patrol team that stopped a motorcycle. The rider was one Roslan bin Adenan. The pillion rider was his housemate, Mohammad Iskandar bin Rosseri. Arising from this inspection, DW3 was charged with accepting RM100 from Mohammad Iskandar bin Rosseri. During the investigation by the then Anti-Corruption Agency ('ACA'), the appellant gave a statement to the ACA investigating officer Jane Flora ak Jingem on 14 July 2005. Her statement was to the effect that all members of the patrol team which included DW3 alighted from the police car at 5pm and inspected the motorcycle. Later, on the same day at about 7pm, when they were having a drink at a Curry House near Impiana Hotel, DW3 told them that one of the two men on the motorcycle gave him RM50. During the trial of DW3, she told the court that DW3 did not come out of the police car during the inspection. She also told the court that when they went to have a drink later, they did not discuss

anything about the incident involving the two men on the motorcycle. The prosecution successfully impeached DW3 on the ground of material discrepancy between the witness statement she gave to ACA officer Jane Flora ak Jingem and her court testimony. DW3 was convicted at the end of the trial but his appeal was later allowed for reasons which are not relevant to the case against the appellant.

CASE AGAINST THE APPELLANT

**[3]** The charge against the appellant is under s 19(2) of the ACA Act. Section 19(2) reads as follows:

> (2) Where any person, who has made a statement to an officer of the Agency or to the Public Prosecutor, in the course of such officer or Public Prosecutor exercising any power conferred by this Act, subsequently thereto makes any other statement to any person having authority or power under any law, or otherwise, to receive, or require to be made, such other statement, regardless whether or not the person making the statement is under a legal or other obligation to tell the truth, he shall, *if such other statement is inconsistent with any statement previously made to an officer of the Agency or the Public Prosecutor,* be guilty of an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both (Emphasis added.)

**[4]** The essential element of the offence created by this section is that an offender had given a statement which is inconsistent with a statement previously made to an officer of the agency. In the instant case, the accusation against the appellant was that she had given court testimony which is inconsistent with her statement given to ACA officer Jane Flora ak Jingem during the investigation into the corruption allegation against DW3. In ordinary parlance, the testimony given during court proceedings would not be considered as a 'statement'. However, s 19(3) reads as follows:

> (3) For the avoidance of doubt, it is declared that for the purposes of paragraph (1)(b) and subsection (2), any statement made in the course of any legal proceedings before any court, whether civil or criminal, or any statement made by any person in the course of any disciplinary proceedings, whether such legal proceedings or disciplinary proceedings are against the person making the statement or against any other person, shall be deemed to be a statement made to a person having authority or power under law to receive the statement so made.

**[5]** To all intents and purposes, this provision enacts that evidence given during court proceedings comes within the meaning of:

> a statement made to a person having authority or power under law to receive the statement so made.

**[6]** The elements of an offence under s 19(2) of the ACA Act are:

(a) that accused had made a statement to an officer of the agency or to the public prosecutor;

(b) that accused had made a subsequent statement (which includes statements made in court proceedings) to a person having authority or power under the law to receive the statement so made; and

(c) that the latter statement is inconsistent with the statement made to the officer of the agency or to the public prosecutor.

**[7]** Since there are no reported precedents on s 19(2) of the ACA Act, the learned sessions court judge referred to the analogous offence under s 193 of the Penal Code, ie giving false evidence. In *Public Prosecutor v Abdullah Ambek* [1984] 2 CLJ 370 which was referred to by the sessions court judge, the High Court stated that the elements of the offence of perjury under s 193 of the Penal Code as follows:

(1) that the accused was legally bound to state the truth, either an oath or by an express provision of law;

(2) that he made such statement;

(3) that such statement was made in a stage of a judicial proceeding;

(4) that a statement was false;

(5) that he either knew or believed it to be false or did not believe it to be true; and

(6) that he did so intentionally.

**[8]** In my opinion, similarly for an offence under s 19(2) of the ACA Act, the prosecution need not prove that either of the two statements is false. All that the prosecution need to prove is that the latter statement in court is inconsistent with the earlier statement made to the ACA officer. The learned sessions court judge found that the appellant had given a statement to Jane Flora ak Jingem who had received the said statement in the performance of her duty as an ACA officer under the ACA Act. The statement was duly proven by the said Jane Flora ak Jingem and admitted into evidence. The learned sessions court judge then admitted the notes of proceedings of the trial of DW3. She found that there were irreconcilable differences in the statement made to Jane Flora ak Jingem and the statement made in court by the appellant. She called for the defence of the appellant. After hearing the defence witnesses, she found that the defence of the appellant did not raise a reasonable doubt in the case for the prosecution.

GROUNDS OF APPEAL

**[9]** Learned counsel for appellant raised numerous grounds before the

learned sessions court judge at the close of the case for the prosecution and at the end of the case for the defence. However, in this appeal, the present counsel for appellant has only raised two broad grounds of appeal:

(a) that the prosecution did not establish the knowledge ingredient of the offence under s 19(2) and that the learned sessions court judge did not consider this ingredient in her judgment; and

(b) that the statement made to Jane Flora ak Jingem is not admissible.

*Element of knowledge*

**[10]** Counsel for the appellant submitted on the authority of *Lim Chin Aik v Regina* [1963] 1 MLJ 50 and *Sweet v Parsely* [1969] 2 WLR 470 that although knowledge is not specifically mentioned in s 19(2), it is an essential ingredient of the offence as a penal provision must be construed strictly. The argument of counsel for the appellant is that the prosecution did not adduce evidence to support the element of knowledge and that the learned sessions court judge did not consider it either. The response of the learned DPP is that knowledge is not an ingredient of an offence under s 19(2) and even if it were otherwise, the prosecution has adduced evidence to prove this ingredient. Section 19(2) requires that the second statement must be inconsistent with the earlier statement to come within its ambit. To my mind, it is implicit in this provision that the offender should have the knowledge that he had made an earlier statement which is inconsistent with his latter statement. The knowledge element comes from the word 'inconsistent'. It necessarily implies knowledge. The offender should have knowledge that he made an earlier statement to an officer of the agency which is inconsistent with a latter statement. Therefore, s 19(2) cannot be said to be a strict liability offence. However, from the notes of proceedings, it is obvious that the prosecution has proved the element of knowledge. Jane Flora ak Jingem had testified that the appellant gave her statement voluntarily. The issue of voluntariness was made an issue in the trial below. The learned sessions court judge ruled that the statement was made voluntarily. This issue is not a ground in the petition of appeal. Even if it was a ground of appeal I see no reason to disagree with her. She had considered the fact that the accused is not an ordinary civilian who would have been browbeaten by an ACA officer into giving a false statement. The appellant was a serving lance corporal in the police force. The learned sessions court judge also found that the statement was read back to the appellant as testified by Jane Flora ak Jingem. In the premises, the appellant had knowledge that the statement is incriminatory of DW3, ie he had come out of the police car together with the others to inspect and question the motorcyclist and his pillion rider and later told his colleagues that he received RM50 from them. In her court testimony during the trial, her evidence in respect of the inspection of the motorcycle exonerated DW3. The appellant said that DW3 did not come

out of the car and did not confess to having received RM50. The two statements are obviously irreconcilable. The first statement palpably incriminates DW3 while the latter statement in court absolves him of any wrongdoing. Therefore, it can be inferred that the appellant had knowledge that her court statement is inconsistent with her statement to Jane Flora ak Jingem. The learned sessions court judge was mindful that knowledge is an element of the offence as she said as follows in her judgment:

> Since the accused had admitted that she gave her statement to PW1 about her service in the police force as per statement P2 and that she did sign P2, it only shows that the accused was fully aware and conscious when P2 was recorded. Furthermore the accused agrees that the question pertaining to her service was only few question and prior to the statement P2 was recorded, the accused already knew that there was allegation towards her colleague had received money and as the accused herself testified that since she was on duty together with the said policeman, the ACA need to record her statement. Hence with this knowledge, it is absurd for the ACA to only asked question about the accused's service record in the police force and not about the incident or the event.
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> … If what the accused had earlier alleged that she never at any material time read and check back the content of P2 on 14 July 2005 how would the accused know that the statement in P2 is not correct? This only show that the accused have the knowledge of the statement given by her to PW1 which was given voluntarily and not a fixed up statement as the accused alleged. The accused had also signed on each page of P2.

**[11]** In this passage of her judgment, the learned sessions court judge adequately dealt with the issue of whether the appellant had knowledge of the significance and content of the statement given to Jane Flora ak Jingem. In the following passage, the learned sessions court judge dealt again with the issue of knowledge on the part of appellant in giving two inconsistent statements:

> … the accused in making those inconsistent statements had made the statement intentionally or voluntarily and which the accused also have the knowledge that those statements P2 and P3(a) were inconsistent. As submitted by the learned DPP, the accused as a witness to the prosecution, the accused must know the reason why she was called by the prosecution for a trial against L/Kpl Busri ie to give evidence to show or prove L/Kpl Busri has committed the offence based on her statement in P2.

**[12]** In the premises, the prosecution had adduced evidence of knowledge on the part of the appellant in giving two inconsistent statements by the direct evidence of Jane Flora ak Jingem and by inference. The judgment of the lower court also clearly shows that the learned sessions court judge dealt with it at length although she did not list 'knowledge' as an element of the offence. In the premises, I see no misdirection here.

*That the statement made to Jane Flora ak Jinsem is not admissible*

**[13]** The argument of counsel for the appellant is as follows. He said that the appellant gave a statement to Jane Flora ak Jingem pursuant to s 22(1)(a)of the ACA Act. He further submitted that a statement under this provision can only be procured pursuant to a written 'order' under the said provision. In this case, the prosecution never produced any written order to the appellant compelling her to appear before Jane Flora ak Jingem to give a statement. Therefore, it follows, according to learned counsel for the appellant, that the statement in question to Jane Flora ak Jingem is inadmissible. With respect to counsel for the appellant, this argument has no merit for the following reasons. The scheme of s 22 of the ACA Act is as follows. Section 22 provides power to an officer of the Agency to examine any person who can assist in investigations. Section 22 provides three modes of examination. Under sub-s 22(1)(a), an officer of the agency may 'order' any person to attend before him for the purpose of being examined orally. Under sub-s 22(1)(b), any person may be ordered to produce any book, document or article that can assist in investigations. Under sub-s 22(1)(c), an officer of the agency, may by written notice require a statement in writing on oath from any person. For ease of reference, I reproduce below the above provisions:

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence;

(b) order any person to produce before him any book, document or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence; or

(c) by written notice require any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation into the offence.

**[14]** In the instant case, the appellant had been required to appear before Jane Flora ak Jingem to give an oral statement that was reduced into writing. However, sub-s 22(1)(a) does not say that the 'order' must be a written order. Even if it is interpreted as 'written' order, I fail to understand why the statement taken under this provision will become inadmissible on the ground that no written order was issued or if issued, it was not produced in court. The only pre-condition of admissibility of a statement under s 22 is that the statement must be voluntarily given, that it must be read back to the witness and that he or she must sign it. The learned sessions court judge had ruled that the statement was voluntarily given by the appellant, that it was read back to her

and that she signed it. Counsel for the appellant had not taken issue with the manner of recording of the statement either in the petition of appeal or in the submission.

**[15]** In the premises, I shall dismiss the appeal against the conviction of the appellant. In respect of sentence, the appellant had been sentenced to 15 months imprisonment and a fine of RM5,000. I shall reduce the imprisonment term to six months. My reasons are as follows. Although the offence in questions is serious, the case of *Public Prosecutor v Abdullah Ambek* which was cited by the learned sessions court judge is not a suitable comparable as it involved giving false evidence in a murder case. In the instant case, it is apparent that the appellant had acted out of a sense of misguided loyalty to a colleague. As a public servant, she stands to lose her job which by itself can be considered as a severe punishment especially as her actions were not motivated by profit. Order accordingly.

*Appeal against conviction dismissed but appeal against sentence allowed.*

Reported by Kohila Nesan